Haji Omar Din bin Mawaidin v Minister for Home Affairs, Malaysia & Anor

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO 44-56-90
EDGAR JOSEPH JR J
2 JUNE 1990

Preventive Detention — Conditions precedent to detention — Detention pending enquiries — Restriction order cancelled under s 4A(3) of Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Detention order made under s 4(1) — Detainee not detained pending enquiries — Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss 3(1), 4(1), 4A(1), (3), 7B(1) & (2)

Constitutional Law — Liberty of the person — Breach of — Detention order made without complying with statutory provisions — Emergency (Public Order and Prevention of Crime) Ordinance 1969, s 3(1) — Constitution of the Federation of Malaysia, art 5(1)

The applicant was the subject of a two-year restriction order made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Before the end of the two years, this order was cancelled by the minister, acting under s 4(A)(3), and a detention order was made under s 4(1) (dated the same date as that of the cancellation order) whereby the applicant was to be detained at the Pusat Pemulihan Akhlak, Pulau Jerejak for two years from 31 March 1990. The issue is whether the minister can revoke a restriction order and substitute for it a detention order without first complying with the requirement under s 3(1) that the suspected person should first be detained pending enquiries for not more than 60 days.

Held, allowing the application for habeas corpus:

The minister had not detained the applicant pending enquiries as required under s 3(1). The requirements of s 3(1) are mandatory and not merely directory, so that the applicant was entitled to the safeguard of enquiries upon detention. The applicant was not afforded the opportunity of being heard, which he would have had if he had been detained pending enquiries. There has therefore been a breach of art 5(1) of the Constitution.

[Bahasa Malaysia summary

Pemohon telah diletakkan di bawah perintah sekatan selama dua tahun yang dibuat mengikut s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969. Sebelum tamatnya tempoh dua tahun itu, perintah ini telah dibatalklan oleh menteri yang bertindak mengikut s 4(A)(3), dan satu perintah tahanan telah dibuat di bawah s 4(1) (bertarikh yang sama seperti tarikh perintah pembatalan). Mengikutnya, pemohon akan ditahan di Pusat Pemulihan Akhlak, Pulau Jerejak untuk dua tahun dari 31 Mac 1990. Isu yang berbangkit ialah samada menteri boleh membatalkan satu perintah sekatan dan menggantikannya dengan perintah tahanan tanpa terlebih dahulu memenuhi kehendak s 3(1) bahawa orang yang disyaki itu mesti terlebih dahulu ditahan tidak melebihi 60 hari sementara siasatan dibuat.

Diputuskan, membenarkan permohonan untuk habeas corpus:

Menteri tidak menahan pemohon sementara siasatan dibuat seperti dikehendaki oleh s 3(1). Kehendak s 3(1) adalah mandatori dan bukan cuma secara arahan. Lantaran itu, pemohon berhak menerima perlindungan siasatan selepas tahanan. Pemohon tidak diberi peluang untuk didengar yang beliau akan menerima sekiranya beliau ditahan sementara siasatan dibuat. Oleh kerana itu, perkara 5(1) Perlembagaan Persekutuan telah dicabuli.]

Cases referred to

1 *Tan Hoon Seng* v *Minister of Home Affairs* [1990] 1 MLJ 171 (refd)
2 *Rajoo s/o Ramasamy* v *Inspector-General of Police & Ors* [1990] 2 MLJ 87 (refd)
3 *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297 (refd)
4 *Koh Yoke Koon* v *Minister for Home Affairs & Anor* [1988] 1 MLJ 45 (folld)
5 *Bowditch* v *Balchin* (1850) 5 Ex 375; 155 ER 165 (folld)
6 *Barnard* v *Gorman* [1941] AC 375 (folld)
7 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(1), 491), 4A(1), (3), 7B(1), (2)

Karpal Singh (*Danny C Navarednam* and *Choo Hon Choy* with him) for the applicant.
Noorbahri bin Baharuddin for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: Before I embark upon a consideration of this application for habeas corpus, there are certain preliminary observations I should like to make.

Judicial review of the actual exercise of the power to detain by the Minister of Home Affairs ('the minister') in cases of preventive detention is very much a matter of statutory interpretation. It goes without saying, therefore, that in cases of preventive detention, the actual wording of the legislation conferring power upon the minister is clearly of critical substance, so that if the width of the discretion is widely drawn, the tendency will be for the court to leave the minister with a broad range of choices within which to act, always provided that the detainee is still free to attempt to impugn the legality of his detention by raising questions as to whether the minister has acted within the powers conferred in the particular case and whether the power to detain has been properly exercised.

There has been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with. (See for example, *Tan Hoon Seng* v *Minister of Home Affairs*,[1] *Rajoo s/o Ramasamy* v *Inspector-General of Police & Ors*[2] and a series of 11 very recent appeals heard together, the first being *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*,[3] in all of which the detainees succeeded on purely procedural or technical grounds.)

I shall now proceed to consider the application before me. For the sake of brevity and convenience, all references to sections in this judgment shall be to the Emergency

(Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') unless the context otherwise requires.

The minister, who is the first respondent herein, purporting to act under s 4A(3), had on 31 March 1990 made an order ('the cancellation order') cancelling a restriction order dated 17 November 1988 made under s 4A(1) ('the restriction order'), whereby the applicant, a self-styled practitioner in traditional medicine, had been restricted to Lumut, Daerah Manjong, Perak, for two years with effect from 19 November 1988. However, contemporaneously with the making of the cancellation order, the minister had, purporting to act under s 4(1), made a detention order, also dated 31 March 1990 ('the detention order') whereby the applicant was to be detained at the Pusat Pemulihan Akhlak, Pulau Jerejak, for a period of two years with effect from 31 March 1990.

The following provisions of the Ordinance are of central importance to this application and I must reproduce them:

> 3(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1).
>
> 4(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.
>
> 4A(1) If the Minister is satisfied that for any of the purposes mentioned in section 4(1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed on that person in respect of his activities, freedom of movement or places of residence and employment, but that for those purposes it is unnecessary to detain that person, he may make an order (hereinafter referred to as a 'restriction order') imposing upon that person (hereinafter, referred to as a 'restricted person') all or any of the following restrictions and conditions:
>
> [Then follows a list of ten possible restrictions and conditions.]
>
> 4A(3) The Minister may from time to time, by order in writing served on a restricted person, vary, add to or cancel any restrictions or conditions imposed upon him under subsection (1), and the restrictions or conditions as so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the period specified by the Minister under subsection (1)(a).
>
> 7B(1) Notwithstanding anything contained in this Ordinance, the Minister may at any time revoke any detention order made under section 4(1), or any restriction order made under section 4A(1), or any suspended detention order, or any direction under section 7A(1) or (2) for the extension of the duration of any such order, if he deems it just or fit to do so.
>
> 7B(2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or to anything done thereunder, or to the power of the Minister to make a fresh order or give a fresh direction under the provisions mentioned in subsection (1) in respect of the person against whom the order or direction which is revoked was made or given.

The affidavit evidence filed on behalf of the minister disclosed that the cancellation order had been served upon the applicant at 4pm on 31 March 1990 at the Contingent Police Headquarters, Ipoh, and that ten minutes later, he had been placed under custody in order to be served with the detention order. Some 15 minutes after that, the grounds of his arrest had been explained to him and then the detention order served upon him. One hour and 15 minutes later, he left under escort for the Pusat Pemulihan Akhlak, Pulau Jerejak, Penang, arriving there on 2 April 1990 when he was handed over to the proper officer.

Before me, counsel for the applicant has challenged both the validity of the detention order and the applicant's detention thereunder on a number of grounds. I do not, however, consider it necessary, having regard to the conclusions at which I have arrived regarding one of these grounds, to deal with the other grounds argued by counsel.

It was contended that where a restriction order is made under s 4A(1) it shall remain in force for a period not exceeding two years (s 4A(1)(a)) but if, during the period it remains in force, the minister is desirous of varying, adding to or cancelling any of the ten sorts of restrictions or conditions imposed upon a restricted person he may do so by order in writing made pursuant to the powers conferred upon him by s 4A(3). But, when as here, the minister is desirous, not of merely varying, adding to or cancelling any restrictions or conditions imposed, but of revoking the restriction order he must have recourse to his powers under s 7B(1).

At this stage, it would be sufficient to say that counsel's submission, in summary, was that the minister had incorrectly invoked his powers of cancellation under s 4A(3); the more appropriate provision being s 7B(1). With this submission I agree. A strict reading of s 4A(3) leads to the conclusion that it is concerned only with the variation of or addition to or cancellation of any restrictions or conditions imposed and not with cancellation of a restriction order itself; though if all the restrictions or conditions are cancelled this would render the restriction order toothless but, with this qualification; namely, that the minister could, at a later date, reimpose any of the restrictions or conditions previously cancelled or indeed impose fresh restrictions or conditions.

However, I shall assume in favour of the minister, though without deciding the point, that this flaw in the process leading to the applicant's detention is not so serious as to preclude the court from condoning it under

the de minimis rule. Similarly, I shall also assume in favour of the minister, again without deciding the point, that a 'fresh order' within the meaning of s 7B(2) means any of the orders categorized under s 7B(1), so that the minister has the power, *provided he complies with the necessary conditions precedent*, to substitute as he did in the present case, a detention order for a restriction order.

I now come to the heart of the present application: can the minister revoke a restriction order and substitute for it a detention order without first complying with the requirements of s 3(1)?

Briefly, s 3(1) requires that a suspected person in respect of whom a police officer has reason to believe there are grounds which would justify detention under s 4(1), shall first be detained pending enquiries for a period not exceeding 60 days. It was said that this would necessitate police investigations, including the interviewing of witnesses and, more importantly, of the arrested person who would thus be afforded the opportunity of being heard and so perhaps, exculpating himself, yet the affidavit evidence filed on behalf of the minister showed that these requirements were never observed. It was pointed out that upon cancellation of the restriction order, the applicant was ten minutes thereafter placed under custody, not for purposes of the enquiries envisaged under s 3(1), but purely for purposes of being served with the detention order which was in fact done five minutes subsequently.

It is obvious that the substitution of a detention order for a restriction order meant that whereas previously the applicant's liberty had been merely curtailed it was now wholly taken away. That power resides in the minister to do so I have no doubt, but to exercise it, it is essential that he acts within the four corners of the Ordinance.

In my view, the requirements of s 3(1) are mandatory and not merely directory, so that the applicant was entitled to the safeguard of enquiries upon detention, yet he was denied that right, with the consequence that he had lost the chance that was fairly open to him in law of exculpating himself from the allegations made against him.

As I said in *Koh Yoke Koon* v *Minister for Home Affairs & Anor*:[4] '... in a matter concerning the liberty of the subject — always a priceless asset — the court should walk very warily, preferring to interpret words and phrases in their ordinary and natural meaning than to embark on inferences or speculations about such a power'. I am fortified in this by the following dictum of Pollock CB in *Bowditch* v *Balchin*[5] cited with approval by Lord Wright in *Barnard* v *Gorman*[6] at p 393: 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.'

The result, therefore, is that although I am completely convinced, having regard to the contents of his affidavit (encl 8), that the minister had acted as he did, in good faith, in the interest of public order and although it is not open to me to consider either the question whether there was reasonable cause to make the detention order or the protestations of innocence of the applicant (see *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*[7] — now given statutory force), I am satisfied that there had been here a breach of the fundamental right guaranteed under art 5(1) of the Federal Constitution and so I have no discretion, but to grant this application. It follows that the applicant must be set at liberty forthwith and I so order.

Application allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Zarinah Marican*

MBF Finance Bhd v Pendaftar Hakmilik Negeri Perak & Anor

HIGH COURT (IPOH) — ORIGINATING MOTION NO 25-1-90
PEH SWEE CHIN J
30 MAY 1990

Land Law — Priority — Indefeasible interests — Restraints against dealings — Charge created over lands — Registrar's caveat entered subsequently at request of Inland Revenue — Income tax owing — Whether chargee's interest subject to claim by Inland Revenue — National Land Code 1965, ss 320(i)(ba) & 340

The applicant, who was the chargee of certain lands, applied for the removal of a registrar's caveat lodged by the first respondent at the behest of the second respondent, who was the Director General of Inland Revenue. The applicant also sought a declaration that the applicant's right as chargee ranked in priority to that of the second respondent. The charge in favour of the applicant was registered on 11 August 1983. The owners of the lands owed the sum of $315,000 in income tax to the Inland Revenue. The registrar's caveat was entered on 22 October 1985 following a written request on behalf of the second respondent dated 10 October 1985 for the purpose of making the lands available to satisfy the income tax liability.

It was submitted that the first respondent had a quasi-judicial function to perform and had acted mala fide in entering the caveat as he should have noticed the registered charge. It was also submitted that the second respondent had no registrable interest in the lands and that he had not proceeded to take action with haste as the caveat functioned like an interim injunction.

It was, inter alia, submitted for the second respondent that there was a conflict between s 340 of the National Land Code 1965 (dealing with indefeasibility of title) and s 320(1)(ba) of the Code and that s 320(1)(ba) having been enacted later in time it prevailed over s 340. It was also submitted for the second respondent that the application was barred by the Public Au-